Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOHN J. TIGUE, JR. and
MORVILLO, ABRAMOWITZ, GRAND,
IASON & SILBERBERG, P.C.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE
and INTERNAL REVENUE SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether the United States Government may refuse (pursuant to Title 5 U.S.C. § 552(b)(5), an exception to the Freedom of Information Act's disclosure requirements which pertains only to inter-agency and intra-agency communications) to disclose a memorandum which was sent from a Government agency to a non-governmental entity.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. is a privately-held law firm. The law firm has no corporate parent and no publicly held company owns 10% of more of its stock.

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OPINIONS BELOW

The decision of the Second Circuit is reported at 312 F.3d 70 (2d Cir. 2002) and is reproduced in the appendix to this petition (Pet. App. 1a-22a). The October 23, 2001 and October 29, 2001 decisions of the United States District Court for the Southern District of New York are unpublished and are reproduced in the appendix to this petition (Pet. App. 23a-26a). Because the October 23, 2001 decision of the District Court relied upon reasons given on the record during oral argument, relevant portions of the transcript of the oral argument are also reproduced in the appendix to this petition (Pet. App. 27a-39a).

JURISDICTION

On November 15, 2002, the Second Circuit affirmed the orders of the district court granting summary judgment in favor of the respondents and denying the petitioners' cross-motion for summary judgment. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act ("FOIA") provides that agencies of the federal Government need not disclose to the public "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

INTRODUCTION

Title 5 U.S.C. § 552(b)(5) ("Exemption 5") exempts from the FOIA's disclosure requirements "inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency." Despite the plain language of Exemption 5, which applies only to "inter-agency or intra-agency memorandums or letters," and this Court's repeated admonition that the limited exemptions to the FOIA's mandate of disclosure be narrowly construed, some federal courts of appeal, including the Second Circuit in this case, have expanded the terms of Exemption 5 on dubious policy grounds to protect from disclosure memoranda written by, or directed to, persons or entities belonging to no Government agency. *See Department of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001) (citing decisions from the Second, Fifth and D.C. Circuits).

As this Court recently noted, those federal courts that have adopted this expansive understanding of Exemption 5 typically "have held that the exemption extends to communications between Government agencies and outside consultants hired by them," characterizing such communications as "intra-agency" memoranda or letters protected from the FOIA's disclosure requirements by the deliberative process privilege. *See id.* at 10. This Court referred to this interpretation of the FOIA as the "consultant corollary to Exemption 5." *Id.* at 11. To date, this Court has not addressed the issue of whether, under *any* circumstance, a consultant's report may be withheld from disclosure under Exemption 5. *Id.* at 12.

Although this Court has never ruled on the validity of the consultant corollary, which is a legal fiction, the functional approach to Exemption 5 embodied by the corollary is contrary to this Court's numerous decisions holding that the exemptions to the FOIA must be construed narrowly in accordance with the

statute's basic policy of disclosure. *See, e.g., Klamath*, 532 U.S. at 8 (FOIA's exemptions "have been consistently given a narrow compass"); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed"). Because the FOIA is to be construed broadly in favor of disclosure while its exemptions are to be construed narrowly, it is improper to expand the bounds of Exemption 5 without a basis in the Statute's text or its legislative history. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). This Court has recognized that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Klamath*, 532 U.S. at 9 (quoting *Department of Justice v. Julian*, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., in dissent)). Similarly, the most natural meaning of the phrase "inter-agency memorandum" is a memorandum addressed between employees of different agencies, a definition which would not apply to the document sought by petitioners.

In this case, relying on the consultant corollary, the Second Circuit held that the document sought by petitioners is protected from disclosure as an "inter-agency" memorandum because the document was transmitted from one Government agency to a "consultant" retained by a separate agency. Petitioners seek to have this Court interpret Exemption 5 narrowly, in accordance with this Court's prior decisions, giving the phrase "inter-agency or intra-agency memorandums" its most natural reading, and preventing further application of the consultant corollary by the courts. In so doing, this Court will lead a number of federal circuits out of error and will clarify the bounds of one of the most frequently relied upon and abused exemptions to the FOIA's disclosure requirements.

STATEMENT

During his public confirmation hearings, then Internal Revenue Commissioner Charles Rossotti promised the United States Senate that he would "reform and improve" the Internal Revenue Service ("IRS"). To that end, Commissioner Rossotti requested that Judge William H. Webster, the former director of the FBI and CIA, direct an "independent review" of the IRS' Criminal Investigation Division ("CID"). Pet. App. 4a.

In response to Commissioner Rossotti's request, Judge Webster assembled a high-profile independent task force, the "Webster Commission," which was neither a Government agency nor a subdivision thereof. Pet. App. 4a, 11a. Petitioners maintained before the Second Circuit that unlike the situation involving a typical agency consultant, the creation and purpose of the Webster Commission was a matter of national news and the "Commission essentially functioned as a watchdog, providing some measure of public oversight over the IRS." Pet. App. 3a, 16a n.4.

After the Webster Commission completed its nine-month review of the CID, it submitted its findings to Commissioner Rossotti in the form of a report (the "Webster Report") which was promptly released to widespread media attention. Pet. App. 5a. The Webster Report discusses in two places a memorandum (the "Memorandum") drafted by Shirah Neiman, Esq., then Deputy United States Attorney for the Southern District of New York, for the benefit of the Webster Commission. Pet. App. 4a-6a.

While reading the Webster Report, petitioner Tigue noticed its discussion of the Memorandum. Mr. Tigue is an attorney whose law firm often represents individuals and entities in connection with tax issues. On August 18, 1999, Mr. Tigue and his law firm made a request under the FOIA to the IRS for a copy of the Memorandum. Pet. App. 6a. Their request was denied by the Department of Justice on April 28, 2000. On September 28, 2000, the Department of Justice denied petitioners' appeal of that decision. Pet. App. 6a.

On February 14, 2001, petitioners filed suit in the United States District Court for the Southern District of New York. The parties each filed motions for summary judgment. On October 23, 2001, the District Court granted defendants' motion for summary judgment in part and denied plaintiffs' motion for summary judgment in part, holding that the Memorandum was an "intra-agency" memorandum exempt from production pursuant to the deliberative process privilege under 5 U.S.C. § 552(b)(5), while reserving the issue of whether the factual portions of the Memorandum could be produced in redacted form. Pet. App. 6a-7a, 16a n.5, 25a-26a. On October 29, 2001, after reviewing the Memorandum *in camera*, the District Court held that all the factual material in the Memorandum was "inextricably intertwined with evaluations and recommendations of policy," and it need not be produced in redacted form. Pet. App. 7a, 23a-24a.

On November 15, 2002, the United States Court of Appeals for the Second Circuit affirmed the rulings of the District Court, holding that the Memorandum was protected by the deliberative process privilege incorporated in Exemption 5. Pet. App. 1a-22a. However, contrary to the District Court's

determination that the Memorandum is an intra-agency IRS document, the Second Circuit concluded that the Memorandum was an inter-agency document. Pet. App. 12a, 16a. The Second Circuit concluded that the Memorandum was "inter-agency" even after that Court framed the "question at issue regarding the intra- or inter-agency requirement [as] whether the document either originated from or was provided to an entity that is not a federal Government agency, in which case the document is not protected by the exemption," and noted that it is "undisputed that the Webster Commission was not an 'agency.'" Pet. App. 11a.

The Second Circuit reasoned that because it had held in a previous decision (which petitioners had argued was incorrectly decided) that "communications with consultants may be considered intra-agency," the narrower issue was whether the Webster Commission "may be considered a part of the IRS for purposes of determining whether the Neiman Memorandum falls within the scope of Exemption 5 as an inter-agency communication." Pet. App. 12a-14a. The Second Circuit answered this question affirmatively, holding "that because the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID, the Neiman Memorandum is an inter-agency communication." Pet. App. 11a-12a. In short, the Second Circuit was able to hold that the Memorandum was exempt from production only by relying on the legal fiction that the

Webster Commission, which was indisputably not part of any federal agency, should be considered a part of the IRS.[1]

REASONS FOR GRANTING THE WRIT

This petition satisfies a number of the traditional hallmarks for obtaining review. The issue for which petitioners seek review has not previously been settled by this Court, although it has been the subject of significant analysis in recent Court *dicta* and in a prior dissenting opinion. *See Klamath*, 532 U.S. at 7-12; *Julian*, 486 at 19. n.1 (dissent). Furthermore, a number of federal courts of appeal have erroneously expanded the bounds of Exemption 5 to the FOIA in a manner inconsistent with the reasoning in many prior decisions of this Court. Moreover, the issue is important because the misguided application of the consultant corollary continues to result in the denial of numerous meritorious FOIA requests each year and unwarranted litigation. This Court should grant review in order to provide clear guidance to the federal judiciary regarding the scope of Exemption 5 and to permit the public to have the access to records intended by the FOIA.

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1. The Second Circuit also held that the Memorandum was a "pre-decisional" privileged document, that the privilege was not waived, and that no purely factual matter in the Memorandum was reasonably segregable from the exempt portions of the Memorandum. *Id.* at 80-82.

I. The Second Circuit Improperly Ignored The Plain Language Of The Freedom of Information Act And This Court's Prior Rulings In Holding That The Memorandum Is An "Inter-Agency" Memorandum Shielded From Disclosure By Exemption 5.

The FOIA requires that agency records be disclosed unless the document sought falls within one of the expressly enumerated exemptions. *See* 5 U.S.C. § 552, 552(b)(5). In this case, the Government claims authority to withhold the Memorandum under Exemption 5, which provides that the FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Government must carry the burden of proof with respect to its claim. 5 U.S.C. § 552(a)(4)(B).

The Government's burden of proving the applicability of an exemption to the FOIA is not intended to be easy. The FOIA was enacted to promote a "general philosophy of full agency disclosure" in an effort to encourage "open and honest government." *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). The Statute "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). As such, the Act's "basic purpose . . . is to ensure an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Thus, "disclosure, not secrecy is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). To these ends, it is well established that the FOIA must

be broadly construed in favor of disclosure and that all exemptions from disclosure set forth in the FOIA must be narrowly construed. *Klamath*, 532 U.S. at 8 (citing *United States Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

By its terms, Exemption 5 applies only to inter- or intra-agency memoranda and letters. 5 U.S.C. § 552(b)(5). Exemption 5 also incorporates all civil discovery privileges, including the deliberative process privilege, a subset of the executive privilege. The deliberative process privilege is based on the premise that agency officials will not communicate candidly amongst themselves if their remarks are potentially discoverable. *Klamath*, 532 U.S. at 10. The privilege is intended to enhance the quality of agency deliberations. However, because Exemption 5 may be applied only to "inter-agency or intra-agency memorandums or letters," where this "threshold condition" is not met, the issue of privilege need not be reached. *See id.* at 9, 12 n.3.

In March 2001, after noting that all its prior decisions discussing Exemption 5 concerned the Exemption's "second condition" – that the agency need not disclose documents that would not be discoverable in civil litigation – this Court cautioned that "the first condition of Exemption 5 is no less important than the second: the communication must be 'inter-agency or intra-agency.'" *Id.* at 9. The Court emphasized that there is "no textual justification for draining the first condition of independent vitality . . . ." *Id.* at 12.

In this case, the Second Circuit's decision was made in contravention of the plain language of the statute, this Court's

exhortations that Exemption 5's inter- or intra-agency requirement be taken seriously, and the undisputed facts. The Second Circuit expressly recognized that it is "undisputed that the Webster Commission," the recipient of the Memorandum, "was not an 'agency.'" Pet. App. 11a. Consequently, the Memorandum should not be considered an inter- or intra-agency memorandum subject to Exemption 5.

The Second Circuit's erroneous decision in this case was a direct result of its reliance on wrongly decided Second Circuit precedent. *See* Pet. App. 12a-16a (citing *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979)). In the 1979 *Lead Industries* case, the Second Circuit adopted the consultant corollary and its underlying rationale, as it first appeared in a footnote to a decision authored by the D.C. Circuit in 1971 precisely as it was expressed in that case. *See Lead Industries*, 610 F.2d at 83 ("we have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie*") (discussing *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971)). In *Soucie*, the D.C. Circuit held:

> Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to freely give their judgments without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Soucie, 448 F.2d at 1078 n.44.

The Second Circuit reached a decision contrary to law by adopting the consultant corollary. This Court has noted that

the terms of Exemption 5 do not extend to outside consultants. *See Klamath*, 532 U.S. at 9 ("neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders"). Although a dissenting opinion of this Court stated that it is "textually possible" to read the phrase "intra-agency" to include memoranda received from outside sources under certain circumstances, petitioners submit that this is possible only by adopting the legal fiction that an outside source may be deemed part of the agency in question. *See Julian*, 486 U.S. at 19 n.1 (Scalia, J., in dissent). In fact, the same dissenting opinion noted that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Id.* A majority of this Court recently noted the divergence of these two views. *Klamath*, 532 U.S. at 10 (characterizing the more expansive interpretation as "the latter view").

This Court has repeatedly instructed that statutes are normally to be interpreted in accordance with the ordinary meaning of its terms. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000) (starting with "the language of the statute," whose words are given their "'ordinary, contemporary common meaning,' absent an indication Congress intended them to bear some different import") (quotation omitted); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (in the absence of an express definition, a statutory term shall be construed in accordance with its "ordinary or natural meaning"); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"). Given that the FOIA must be

construed broadly in favor of disclosure while its exemptions must be construed narrowly, adherence to the natural meaning of the terms of the exemptions is of paramount importance.

Where, as here, the plain language of a statute is unambiguous, there is no need to consider legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 164 (1991) (legislative history "makes no difference" where "the plain language of the statute" is clear); *Garcia v. United States*, 469 U.S. 70, 75 (1984) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'"). This notwithstanding, the FOIA's legislative history does not reveal a Congressional intention to read the language of Exemption 5 expansively. To the contrary, this Court has concluded that Congress "expressly intended 'to delimit the exception (5) as narrowly as consistent with efficient Government operation.'" *Mink*, 410 U.S. at 89 (citing S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9 (1965) and H.R. Rep. No. 1497, 89th Cong. 2d Sess., at 10 (1966)). Beyond the unsupported policy considerations of certain members of the federal judiciary, there is no evidence to suggest that disclosing to the public consultants' reports (or memoranda submitted to consultants) will impinge efficient Government operation.

In addition, the policy considerations which led Judge Bazelon to create the consultant corollary, the same policy considerations underlying the deliberative process privilege, are by no means compelling. In no event should they lead a court to disregard the ordinary meaning of the terms of Exemption 5. In fact, noted commentators have concluded that the deliberative process privilege "rests on . . . a puny instrumental rationale." Charles A. Wright & Kenneth W. Graham, *Federal*

Practice & Procedure: Evidence § 5680 (2001). According to Wright and Graham:

> The purpose of the deliberative process privilege, we are told, is to "encourage free exchange of ideas during the process of deliberation and policy making" and thus to "prevent injury to the quality of agency decisions." It rests upon two dubious empirical assumptions. The first is that government bureaucrats "will not feel free to express their opinions fully and candidly when they fear that their views will be made public." The second is that "effective and efficient governmental decision making depends on the free and uninhibited flow of ideas." However, . . . the enthusiasts for the privilege never trouble to explain how a bureaucrat who does not think his civil service status is enough protection against public criticisms of his ideas will be encouraged to speak out by a privilege that is under the control of the political head of the agency who will be only too happy to waive the privilege when it serves his need to scapegoat his underlings for bad advice and thus avoid political responsibility for bad agency decisions. Moreover, as one astute student writer has pointed out, the candor rationale would be adequately served by a privilege that protected the name of the idiot but not the nature of the idiocy.

Id. (citations omitted).

This instrumental rationale makes even less sense when applied to independent consultants, who, unlike the Webster Commission, typically are paid for their efforts and their opinions and typically are controlled by the agency which hired them. To the extent a consultant believes having his opinions

available to the public will make it less desirable to offer his opinions, this can be factored into the price at which he offers his services to the Government. The instrumental rationale makes no sense whatever when applied to the Webster Commission itself, given the Commission's public profile and independent purpose. This case demonstrates that the Government will use the label "consultant" as widely as is necessary when it wishes to keep certain documents hidden from public view. *Cf. Klamath*, 532 U.S. at 12 ("The Department [of the Interior] seems to be saying that 'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential.").

It should be left to Congress, not judges, to amend the FOIA if it believes that consultants not employed by any agency deserve the same protection from scrutiny that has been extended to agency employees. To date, Congress has shown no reluctance to amend the FOIA since its passage in 1966, having done so in 1967, 1974, 1976, 1978, 1984, 1986, 1996, and 2002. Because documents given to, or received from, outside consultants are not protected from disclosure under Exemption 5, this petition should be granted.

II. The Question Presented is Important and Recurring.

On average, the Federal Government receives *600,000* FOIA requests each year. David Boling, *Access to Government-Held Information in Japan: Citizens 'Right to Know' Bows to the Bureaucracy*, 34 Stan. J. Int'l. L. 1, 6 n.28 (1998). Furthermore, a Congressional study revealed that during the four years after the FOIA was established,

Exemption 5 was relied upon by the Government as the second most common ground for refusing to disclose information. *Freedom of Information Amendments Sourcebook, House Government Operations Committee and Senate Judiciary Committee*, 94th Cong., 1st Sess., at 104-05 (1975). In addition, it is generally accepted that federal agencies often enlist the opinions and advice of temporary consultants, particularly when addressing issues outside their normal area of expertise. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Hoover v. United States Department of the Interior*, 611 F.2d 1132 (5th Cir. 1980); *Lead Industries*, 610 F.2d at 83; *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *Soucie*, 448 F.3d at 1078 n.44. In short, the Government makes a general practice of relying on non-governmental personnel in the creation of policies effecting the public without having to disclose to the public the nature of the outside advice or information it receives or the Government's reliance on this advice or information.

The question as to the reach of Exemption 5 is also important due to the apparent willingness of the Government and the federal courts to interpret Exemption 5 in an increasingly elastic manner. Shortly after the FOIA was enacted, Exemption 5 was recognized as potentially the broadest exemption to the Statute's disclosure requirements. *See* Note, *The Freedom of Information Act and the Exception for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048 (1973); *cf.* Wright & Graham, *supra*, § 5680 ("The prediction that Exemption 5 was potentially the 'most far reaching' of the FOIA exemptions has proven to be true in practice."). Courts quickly noticed "the 'inevitable temptation of a governmental

litigant to give [Exemption 5] an expansive interpretation in relation to the particular records at issue.'" *Soucie*, 448 F.2d at 1078 (quotation omitted). Since then, Exemption 5 has been applied "to an increasingly broader range of agency communications," including "budget requests, pre-sentence reports to federal judges, summaries of the testimony of witnesses at a public hearing, I.R.S. secret policies and efforts to cover-up political interventions by members of Congress in the problems of individual taxpayers, and routine applications of agency policy." Wright & Graham, *supra*, § 5680.

The question as to the reach of Exemption 5's consultant corollary is often before the federal courts. *See, e.g.*, *Klamath*, 532 U.S. at 7-12; *Julian*, 486 U.S. at 19 n.1 (dissent); *Tigue v. Department of Justice*, 312 F.3d 70 (2d Cir. 2002); *Cuomo*, 166 F.3d 473; *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D. C. Cir. 1997); *Formaldehyde Institute v. Department of Health & Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989); *CNA*, 870 F.2d 1132; *Hoover*, 611 F.2d 1132; *Lead Industries*, 610 F.2d 70; *Soucie*, 448 F.2d 1067. However, despite the substantial litigation regarding the reach of Exemption 5, there is no unanimity of opinion regarding how the consultant corollary should be applied. For example, in characterizing the D.C. Circuit's view of Exemption 5, the Ninth Circuit recently stated that it "has not yet had occasion to address the reach of the inter-agency/intra-agency test under Exemption 5 and to determine whether the expansive interpretation adopted by the District of Columbia is consistent with the policy of broad disclosure on which the FOIA is anchored." *Klamath*, 189 F.3d at 1038 (discussing *Public Citizen*, 111 F.3d 168, *Formaldehyde*, 889 F.2d 1118, and *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980)).

Widespread confusion over important and recurring questions, conflict with prior Supreme Court precedent, and disharmony with the plain language of federal statutes, even in the absence of a true circuit court split, are factors which militate strongly in favor of granting ceritorari. Stephen M. Shapiro, "*Ceritorari Practice: The Supreme Court's Shrinking Docket*," 24 No. 3 Litigation 25, 29 (1998). This case provides an excellent opportunity for this Court to delineate certain boundaries for an increasingly expansive exemption from the FOIA's disclosure requirements and to make additional litigation over the availability of consultants' reports unnecessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2003

APPENDIX A – MEMORANDUM AND ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED NOVEMBER 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

Argued: July 15, 2002 Decided: November 15, 2002

Docket No. 01-6243

JOHN J. TIGUE, JR., MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C.

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, INTERNAL REVENUE SERVICE,

Defendants-Appellees.

Appendix A

Before: CABRANES, SOTOMAYOR, *Circuit Judges*, and GLEESON, * *District Judge*.

* * *

SOTOMAYOR, *Circuit Judge*.

This appeal was brought by a lawyer and his law firm seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), to a memorandum ("the Neiman Memorandum" or "Memorandum") prepared by an assistant United States Attorney in the Southern District of New York ("Southern District") and sent to a public commission. The Neiman Memorandum outlines the Southern District's opinions and recommendations as to how the Internal Revenue Service ("IRS") should conduct criminal tax investigations. The Memorandum was written for, and forwarded to, the Criminal Investigation Division Review Task Force headed by Judge William Webster ("the Webster Commission"), which was established by the IRS to gather information and make suggestions on how to reform its Criminal Investigations Department ("CID"). The district court held that the government did not have to produce the Neiman Memorandum because it was shielded by the FOIA's exemption for documents reflecting an agency's deliberative processes, relying on 5 U.S.C. § 552(b)(5).

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* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A

On appeal, plaintiffs claim that the Neiman Memorandum was not an intra- or inter-agency document as required for exemption under § 552(b)(5) because it was provided to the Webster Commission, an independent task force that intended to issue a public report of its findings, and that it is not privileged as material of an agency consultant. Plaintiffs also contend that the Neiman Memorandum is not "predecisional" because it was prepared to assist the Webster Commission rather than the IRS and does not relate to a sufficiently specific agency decision. They further argue that even if the deliberative process exemption applies, the government waived that protection by reproducing a quotation from the memorandum in the report published by the Webster Commission ("Webster Report" or "Report"). Finally, they argue that if the document is protected, any purely factual sections should be made available. We disagree. We hold that (1) the Webster Commission was a consultant to the IRS that was charged with assisting the agency in developing its policy, rendering a memorandum sent from the Southern District to the Webster Commission an inter-agency document; (2) because the IRS created the Webster Commission in order to help it decide whether and how to reform the CID, the document is predecisional; (3) because the Webster Commission's Report was not a final decision, the government did not waive executive privilege; and (4) after *in camera* review, the district court properly found that there were no reasonably segregable parts of the Neiman Memorandum subject to disclosure.

Appendix A

BACKGROUND

During his confirmation hearings before the Senate in the fall of 1997, IRS Commissioner Charles Rossotti made a commitment to improving the quality of service provided by each of the major components of the agency. To that end, in July 1998, Rossotti asked Judge William Webster, former director of both the FBI and the CIA, to establish a task force to conduct an "independent review" of the IRS's CID to "determine [CID's] effectiveness in accomplishing its mission, and make recommendations for improvement." Judge Webster recruited a number of experts with extensive experience in criminal investigations, law enforcement and federal prosecution to serve on the Webster Commission.

The Webster Commission spent nine months reviewing "countless" documents and interviewing over 600 people, including a number of law enforcement officials. The Webster Commission specifically requested the opinions of the Southern District because it handled more tax investigations than any other district. Then-Deputy U.S. Attorney Shirah Neiman wrote a sixteen-page memorandum expressing the views of the Southern District on "the various agency components involved in criminal tax enforcement; . . . the then existing focus of tax investigations and prosecutions and the deployment of IRS resources; . . . the difference[s] between [the Southern District's] position on various issues and that of other agency components; . . . and [the Southern District's] recommendations to ensure the continuation of vigorous criminal tax enforcement." According to Neiman, the Neiman Memorandum expressed the views of the Southern District and not those of

the Department of Justice as a whole or Neiman as an individual, and her expectation that the memorandum would remain confidential contributed to her willingness to express the Southern District's opinions and policies about tax investigations.

The Webster Commission released its Report on April 9, 1999 to significant media attention. The 113-page Report includes both a factual inquiry into the practices of the CID and a set of recommendations about how the CID should be improved. Included in the Report is a letter from Commissioner Rossotti stating that the Report "will guide us to improve the work of this critically important component of tax administration for many years to come" and that the IRS concurred with the specific recommendations in the Report, although noting that "some of the recommendations, particularly those concerning organization structure, need further analysis and design work in coordination with our other organizational changes."

The Neiman Memorandum is mentioned twice in the Report. First, the Neiman Memorandum is referenced in a footnote as representing an opposing view to the position held by the leadership of the Department of Justice Criminal Division, most United States Attorneys, and other important figures in criminal enforcement, all of whom apparently believe that the CID should continue to investigate money laundering and narcotics cases. Later in the Report, it is quoted as criticizing the use of administrative investigations and IRS summons because they are slower than grand jury subpoenas:

"[s]ervice of an administrative summons simply does not convey the urgency of a grand jury subpoena, and is not as readily enforceable as a subpoena, and represented subjects of administrative investigations often succeed in dragging out these investigations for unimaginably long periods."

Plaintiff John Tigue, an attorney whose law firm, Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., often represents individuals in connection with federal grand jury tax investigations and IRS administrative investigations, enforcement actions, and prosecutions, obtained a copy of the Report and noticed the references to the Neiman Memorandum. Believing that review of the Neiman Memorandum would improve his understanding of Southern District policy and thus allow him to represent his clients better, Tigue and his law firm ("plaintiffs") submitted a FOIA request for the Neiman Memorandum on August 18, 1999. Following a period of delay in which the Department of Justice ("DOJ") and the IRS attempted to discern which agency should respond to the FOIA request, the DOJ denied the application on April 28, 2000, and, on September 28, 2000, denied the appeal, citing 5 U.S.C. § 552(b)(5), which protects the so-called "deliberative process privilege."

On February 14, 2001, plaintiffs filed suit against the IRS and the DOJ in the United States District Court for the Southern District of New York. The parties cross-moved for summary judgment. Following oral argument on October 23, 2001, Judge Hellerstein ruled that the Neiman Memorandum met the requirements of § 552(b)(5) and was therefore exempt

from production under the FOIA, and that the government had not waived the privilege by citing to and quoting from the Neiman Memorandum in the published Report. At that time the court also requested that the government review the Neiman Memorandum to determine whether any sections of the document could be produced as purely factual. On October 29, 2001, after *in camera* review of a marked copy of the Neiman Memorandum, the district court issued an order finding that the Memorandum was "predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." The district court also found that "[t]here is no factual material in the report that is not inextricably intertwined with evaluations and recommendations of policy" and thus denied plaintiffs' alternative request for partial production of the Neiman Memorandum.

Plaintiffs appeal both the October 23, 2001 and October 29, 2001 rulings.

DISCUSSION

This Court reviews *de novo* a district court's grant of summary judgment in FOIA litigation. *Halpern v. FBI,* 181 F.3d 279, 288 (2d Cir. 1999). This Court also reviews *de novo* a district court's decisions whether to require partial production of documents following *in camera* review, in keeping with the spirit and the text of the FOIA and its presumption in favor of

disclosure. *Grand Cent. P'ship, Inc. v. Cuomo,* 166 F.3d 473, 478 n. 2 (2d Cir. 1999).

The FOIA, 5 U.S.C. § 552, was enacted to ensure public access to information created by the government in order "to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Thus, "[u]pon request, FOIA mandates disclosure of records held by a federal agency unless the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 7, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (internal citations omitted). The Supreme Court has counseled that these exceptions are to be interpreted narrowly in the face of the overriding legislative intention to make records public. *See id.* at 7-8, 121 S.Ct. 1060.

At issue here is FOIA Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.,* attorney-client, work-product, executive privilege) are protected from disclosure

under Exemption 5."[1] *Grand Cent. P'ship,* 166 F.3d at 481 (internal quotation marks and citation omitted).

Specifically, the government claims that the deliberative process privilege, a sub-species of work-product privilege that "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,' " *Klamath,* 532 U.S. at 8, 121 S.Ct. 1060 (quoting *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)), permits withholding of the Neiman Memorandum. The rationale behind this privilege is "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government." *Id.* at 8-9, 121 S.Ct. 1060 (quoting *Sears,* 421 U.S. at 151, 95 S.Ct. 1504); *accord Coastal States,* 617 F.2d at 866 ("The [deliberative process] privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their

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1. "This discovery standard can only serve as a rough guide to the courts, since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases." *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 862 (D.C. Cir.1980) (internal citations and quotation marks omitted); *accord EPA v. Mink,* 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.").

In order for a document to be protected by deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) "predecisional"; and (3) deliberative. *See Klamath,* 532 U.S. at 8, 121 S.Ct. 1060 (discussing the agency-origin requirement); *Local 3, Int'l Bhd. of Elec. Workers v. NLRB,* 845 F.2d 1177, 1180 (2d Cir. 1988) (enumerating the predecisional and deliberative requirements); *Lead Indus. Ass'n, Inc. v. OSHA,* 610 F.2d 70, 83 (2d Cir. 1979) (same). Plaintiffs concede that the Neiman Memorandum is, at least in part, deliberative, but challenge the government's right to withhold the Memorandum on the other two grounds.

I. Intra- and inter-agency communications

As noted above, Exemption 5 protects only "intra-agency" or "inter- agency" communications. While "intra-agency" documents are those that remain inside a single agency, and "inter-agency" documents are those that go from one governmental agency to another, they are treated identically by

courts interpreting FOIA. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975) ("Exemption 5 does not distinguish between inter-agency and intra-agency memoranda."). The question at issue regarding the intra- or inter-agency requirement is whether the document either originated from or was provided to an entity that is not a federal government agency, in which case the document is not protected by the exemption.

The Supreme Court has cautioned that the term "intra-agency" is not "just a label to be placed on any document the Government would find it valuable to keep confidential." *Klamath,* 532 U.S. at 12, 121 S.Ct. 1060. By statutory definition, " 'agency' means each authority of the Government of the United States," with certain exemptions not relevant here. 5 U.S.C. § 551(1). It is undisputed that the Webster Commission was not an "agency." *See Meyer v. Bush,* 981 F.2d 1288, 1298 (D.C. Cir. 1993) (holding that a task force created by the President to study regulatory relief is not an "agency" under the FOIA). From this uncontested point, plaintiffs reason that Exemption 5 cannot apply. The government, in turn, contends that because the Webster Commission acted as a consultant to the IRS, an agency, in soliciting the Neiman Memorandum, and relied on the Neiman Memorandum in preparing the Webster Report for the IRS, the district court properly concluded that the Neiman Memorandum was an intra-agency communication. The government also argues that the Neiman Memorandum could be deemed an inter-agency communication because it was provided by the Southern District for use in the IRS decision-making process. For the

reasons that follow, we conclude that because the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID, the Neiman Memorandum is an inter-agency communication.

In considering the scope of Exemption 5, this Circuit has recognized that agencies may require assistance from outside consultants in formulating policy, and has held that "nothing turns on the point that ... reports were prepared by outside consultants ... rather than agency staff." *Lead Indus.*, 610 F.2d at 83 (citing *Soucie v. David,* 448 F.2d 1067, 1078 n. 44 (D.C. Cir. 1971)); *accord Ryan v. Dep't of Justice,* 617 F.2d 781, 790 (D.C. Cir. 1980) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5."). [2] Instead, "[w]hether a particular document is

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2. In *Klamath,* the Supreme Court recently considered claims that documents submitted by various Indian tribes to the Department of the Interior expressing the tribes' positions on a water allocation project were "intra-agency" documents entitled to protection under Exemption 5. *Klamath,* 532 U.S. at 7-16, 121 S.Ct. 1060. In rejecting that argument, the Court observed that "[a]lthough neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-agency' memorandum under Exemption 5." *Id.* at 9, 121 S.Ct. 1060 (citing

exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." *Lead Indus.*, 610 F.2d at 80.

Plaintiffs acknowledge that this Court has held that communications with consultants may be considered intra-agency, but argue, relying heavily on the D.C. Circuit's opinion in *Dow Jones & Co. v. Dep't of Justice,* 917 F.2d 571, 574 (D.C. Cir. 1990), that because the memorandum was prepared to assist the Webster Commission with its decisionmaking and was never reviewed by any IRS decisionmaker, the consultant principle is inapposite. In *Dow Jones,* the government had argued that documents provided by the Department of Justice to Congress were protected as inter-agency documents. The D.C. Circuit rejected that position on the grounds that documents prepared to assist with Congress's deliberative process could not be entitled to Exemption 5 privilege because Congress was not an agency for FOIA purposes. *Id.* Here, in contrast, the Webster Commission was not acting on its own behalf in requesting the Neiman Memorandum from the

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Hoover v. U.S. Dep't of Interior, 611 F.2d 1132, 1137-38 (5th Cir. 1980); *Lead Indus.*, 610 F.2d at 83; *Soucie,* 448 F.2d at 1067). While the Supreme Court declined to rule on the validity of this "consultant corollary," it distinguished the tribes from consultants, noting that the latter typically "have not been communicating with the Government in their own interest or on behalf of any person or group whose interest might be affected by the Government action addressed by the consultant [and thus] may be enough like the agency's own personnel to justify calling their communications 'intra-agency.' " *Klamath,* 532 U.S. at 11, 12, 121 S.Ct. 1060. Unlike in *Klamath,* plaintiffs in this case do not argue that the Webster Commission is an interested party.

Southern District--rather, it was acting as a consultant to the IRS, an agency, to assist that agency with developing policy recommendations regarding the CID. Plaintiffs recognize, as they must, that the privilege would have been maintained had Neiman given her memorandum directly to the IRS. *Renegotiation Bd.*, 421 U.S. at 188, 95 S.Ct. 1491 ("By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."). The fact that Neiman transmitted it to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter our view of the matter.

Plaintiffs also contend that an agency consultant's source material cannot be withheld under Exemption 5 where the author had no reasonable expectation that her material would be kept confidential. According to plaintiffs, "[w]here there is no fear of publicity, there is no basis in policy for extending Exemption 5 to consultants' work, especially where the statutory language does not provide for such a result." The issue here, however, is not whether the Webster Commission's public Report is exempt, but rather, whether the Commission may be considered a part of the IRS for purposes of determining whether the Neiman Memorandum falls within the scope of Exemption 5 as an inter-agency communication. Although the Webster Commission may have had no intention to keep private *its* findings and recommendations, this has no bearing on the

Southern District's expectation that its opinions would be kept confidential by the Webster Commission and the IRS. In fact, this Court has held that editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions that Exemption 5 was designed to protect. *See Lead Indus.*, 610 F.2d at 86 ("If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.").[3]

Just as predecisional documents prepared by the Webster Commission for the IRS would be deemed *intra*-agency communications, *see id.* at 83, otherwise privileged communications by another agency intended to assist the Commission with its ultimate responsibilities to the IRS are, for purposes of the FOIA, *inter*-agency communications with the IRS. *Cf. Dow Jones*, 917 F.2d at 575 ("Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of *the agency's* deliberative process."). The Webster Commission was acting as a consultant to the IRS when it solicited the Memorandum. It was charged with assisting the

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3. To the extent that plaintiffs argue that the publication of the Report with a reference to the Neiman Memorandum suggests that there is no basis to protect the Memorandum as a consultant's source material, that argument is addressed in greater detail below in the discussion of waiver.

IRS with determining how best to reform the CID, and the Commission's Report proposed solutions to specific problems within the CID based on the information conveyed to the Commission by the Southern District, among its other sources.[4] To conclude that the deliberative process privilege does not apply when an outside consultant to an agency receives information from another agency effectively would condition the use of consultants on both agencies' willingness to disclose any information the consultant reviews in the process of its work and would unreasonably hamper agencies in their decision-making process.

Insofar as the communications were between the Southern District and a consultant for the IRS, the Neiman Memorandum is more properly considered an inter-agency document than an intra-agency document, in that it was prepared by one governmental agency for use by another agency.[5] The interposition of the Webster Commission between the two agencies does not alter this result. We therefore find the Neiman Memorandum eligible for protection under the first prong of Exemption 5.

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4. Although plaintiffs state that the Webster Commission "essentially functioned as a watchdog, providing some measure of public oversight over the IRS," they acknowledge that part of the Commission's assignment included evaluating CID policies and making recommendations for improvement.

5. Alternatively, as a document prepared for use by a consultant to an agency, the Neiman Memorandum perhaps could also be viewed as an intra-agency document, as the district court concluded. Because we find that the Memorandum is an inter-agency document, we do not decide that issue.

II. Predecisional

"A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision." *Grand Cent. P'ship,* 166 F.3d at 482 (internal quotation marks and citations omitted). Protected by this privilege are "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* (internal quotation marks and citations omitted). However, "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy- oriented judgment." *Id.* (quoting *Ethyl Corp. v. EPA,* 25 F.3d 1241, 1248 (4th Cir. 1994) (internal quotation marks omitted)).

Plaintiffs argue that because the Neiman Memorandum was provided to the Webster Commission, rather than to the IRS, it cannot be deemed predecisional, as it was never relied upon by any IRS decisionmaker. As source material for the Webster Report, however, the Neiman Memorandum was prepared for the Commission in order to assist the IRS in its decisionmaking regarding the future of the CID. This decisionmaking is precisely the type contemplated by *Grand Central Partnership.*

Plaintiffs further contend, citing *Maricopa Audubon Society v. United States Forest Service,* 108 F.3d 1089, 1094

(9th Cir. 1997), that the district court erred in failing to identify any specific decision connected to the Memorandum. In *Maricopa,* the government had argued that "because agencies are involved in a continual process of self-examination, [they] need not identify a specific decision in which [documents claimed to be protected under Exemption 5] will culminate in order for those materials to be 'predecisional.' " *Id.* The Ninth Circuit disagreed, holding that while an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, the government must show that the material was prepared to assist the agency in the formulation of some specific decision. *Id.* In other words, while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante,* the document for which executive privilege is claimed related to a specific decision facing the agency. *See Sears,* 421 U.S. at 151 n. 18, 95 S.Ct. 1504. The Neiman Memorandum, however, meets the criteria established in *Maricopa,* as it is "not merely part of a routine and ongoing process of agency self-evaluation," *Maricopa,* 108 F.3d at 1094, but rather was specifically prepared for use by the Webster Commission in advising the IRS on its future policy with respect to the CID. As in *Maricopa,* the fact that the government does not point to a specific decision made by the IRS in reliance on the Neiman Memorandum does not alter the fact that the Memorandum was prepared to assist IRS decisionmaking on a specific issue.

We therefore conclude that the district court did not err in holding that the Neiman Memorandum falls within the Exemption 5 privilege.

III. Waiver

Even though protected by Exemption 5, the government nonetheless may be required to disclose the Neiman Memorandum if it waived the deliberative process privilege. Consistent with 5 U.S.C. § 552(a)(2), which requires disclosure of *final* agency decisions, the Supreme Court held in *Sears* that production of ostensibly predecisional material may be compelled where "an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion." *Sears,* 421 U.S. at 161, 95 S.Ct. 1504. In so concluding, the Supreme Court reasoned that:

> [t]he probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below.

Id.

Plaintiffs contend that the citation to and publication of an excerpt of the Neiman Memorandum in the Webster Report, which was ultimately made public, was a waiver of the privilege provided by Exemption 5. Under the circumstances here, however, the minor references to the Neiman Memorandum cannot be said to be an express adoption or

incorporation. *See Access Reports v. Dep't of Justice,* 926 F.2d 1192, 1197 (D.C. Cir. 1991) (distinguishing between "reference to a report's conclusions [and] adoption of its reasoning," and noting that "it is the latter that destroys the privilege"); *Common Cause v. IRS,* 646 F.2d 656, 660 (D.C. Cir. 1981) (holding that a "casual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda" does not waive Exemption 5).[6] Accordingly, we conclude that the government did not waive its right to assert the deliberative process privilege as to the Neiman Memorandum.

We also reject plaintiffs' position that Neiman's knowledge that the Webster Commission would issue a published report constitutes a waiver of the deliberative process privilege. Even if Neiman could have been expected to know that a report would be published, we find no reason to doubt that she expected that her Memorandum would remain confidential. As previously noted, she prepared the Memorandum to give the Southern District's recommendations, based on its experience, to the IRS, for use in the IRS's internal evaluation through the Webster Commission. In choosing to reveal the existence of the Memorandum and to publish a very brief excerpt, the Commission exercised its discretion by

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6. We also note that this "waiver by incorporation" doctrine applies only where the agency expressly adopts or incorporates an inter- agency memorandum "*in what otherwise would be a final opinion.*" *Sears,* 421 U.S. at 161, 95 S.Ct. 1504 (emphasis added). Arguably, as the Webster Report was not drafted by IRS decisionmakers, and it was prepared to aid the IRS in making its decision about internal reforms, it was not a "final opinion."

revealing only information that it determined should be made public and withholding the rest. *Cf. Rockwell Int'l Corp. v. Dep't of Justice,* 235 F.3d 598, 603-04 (D.C. Cir. 2001) (rejecting claim that partial publication of a document waived the attorney-client privilege as to the remainder of that document). Although the fact that the agency in *Rockwell International* took additional steps to ensure confidentiality also factored into the D.C. Circuit's finding that the attorney-client privilege had not been waived in that case, we conclude that, for purposes of the deliberative process privilege, the incorporation of one sentence from the Neiman Memorandum in the published Report is not inconsistent with the IRS's or the Southern District's "desire to keep the rest secret." *Id.* at 605.

IV. *In camera* review

Finally, plaintiffs urge us to release any portions of the Neiman Memorandum that contain purely factual information. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

At oral argument, we requested that the government provide a redacted version of the Neiman Memorandum indicating what factual information, if any, was within the public domain. The government complied, but continued to maintain that this information should be withheld because it was intertwined with and provided insight into privileged material. After *de novo in camera* review of the original and

redacted memoranda, we conclude that the district court properly found that "the document is predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." We also conclude that even the limited factual material admittedly in the public domain is too intertwined with evaluative and policy discussions to require disclosure. *See Lead Indus.*, 610 F.2d at 85.

CONCLUSION

For the foregoing reasons, we affirm the orders of the district court granting defendants' motion for summary judgment and denying plaintiffs' cross motion for summary judgment.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 29, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 1197 (AKH)

ORDER FINDING EXEMPTION

JOHN J. TIGUE, JR., MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, INTERNAL REVENUE SERVICE,

Defendants.

ALVIN K. HELLERSTEIN, U.S.D.J.:

I have reviewed the entire sixteen-page memorandum dated February 23, 1999 from Shirah Neiman, Deputy United States Attorney to Michael Shaheen, Special Counsel, Criminal Investigation Division Review.

Having reviewed the document, I find that the document is predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service. Accordingly, the entire document is entitled to protection under 5 U.S.C. § 552(b)(5). There is no factual material in the report that is not inextricably intertwined with evaluations and recommendations of policy. See Lead Indus. Ass'n v. OSHA 610 F.2d 70, 85 (2d Cir. 1979).

The memorandum will be maintained under seal pursuant to my separate order of this date.

In order to provide additional assistance to petitioner, I note for the record that counsel for the Government has placed boxes around the following in the memorandum:

- p. 1, lines 1 to 18
- p. 2, lines 2 to 40
- p. 12, lines 7 to 13.

As stated above, the material within the boxes is not discoverable for the reasons stated above.

SO ORDERED.

s/Alvin K. Hellerstein
United States District Judge

Dated: October 29, 2001
New York, New York

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 23, 2001 AND RELEVANT EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT HELD OCTOBER 23, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 1197 (AKH)

SUMMARY ORDER

JOHN J. TIGUE, JR., MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, INTERNAL REVENUE SERVICE,

Defendants.

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on October 23, 2001. For the reasons stated on the record on October 23, 2001, I grant each motion in part and deny each motion in part, as follows:

Appendix C

I grant Defendants' Motion for Summary Judgment and dismiss the Complaint except that I will inspect the memorandum at issue *in camera* to determine if it may be produced to Plaintiffs in some redacted form without divulging privileged material. I deny Plaintiffs' Cross-Motion for Summary Judgment except that I will engage in the *in camera* review of the memorandum. I will issue a subsequent Order expressing my findings concerning possible production of a redacted version of the memorandum after I review it.

SO ORDERED.

s/Alvin K. Hellerstein
United States District Judge

Dated: October 23, 2001
New York, New York

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 1197 (AKH)

JOHN J. TIGUE, JR., MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, INTERNAL REVENUE SERVICE,

Defendants.

October 23, 2001, 9:50 a.m.

Before: HON. ALVIN K. HELLERSTEIN

Appearances:

Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.
Attorneys for Plaintiffs
BY: JOHN J. TIGUE, JR.

MARY JO WHITE
U.S. Attorney for the Southern District of New York
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Appendix C

(Excerpted from Transcript of Oral Argument)

THE COURT: But [the Webster Commission] was really a filter, it seems to me, for the commissioner itself. The issue was whether or not the processes of the Internal Revenue Service had to be changed. The Webster commission was going to make the recommendation that led to this decisional responsibility on the part of the commissioner, and the Webster agency itself was going to rely on the huge number of evaluations and recommendations and fact gathering and anecdotal gathering that went on. Those are customarily the kinds of activities that agencies do when they want to decide whether to change their policies and to what extent.

The difference here is that the IRS, instead of doing it in-house, commissioned a leading expert and noted authority to do it on their behalf. To say that that makes it a private person kind of thing that takes it outside of Exemption 5 I think reads the law rather broadly, more broadly than I think is permissible.

* * *

THE COURT: The Internal Revenue Service is clearly an agency.

MR. TIGUE: Yes, your Honor.

THE COURT: And it's relying on the Webster commission as, broadly speaking, a consultant, as a government group of people who are experts in the business, with a recognized public reputation of delivering a report which was made public. The

difference between what happened here and what happened in the other cases is that the party receiving all this information, filtering it, reducing it and delivering a public report is not an agency itself, but a group of people who were commissioned by the agency to do that job that would otherwise be done by the agency. That's the distinction that you are drawing, I think, or you could draw between what we have here and what is reflected in the cases.

* * *

THE COURT: So what we have is a government agency providing assistance to someone I would call a consultant engaged by another government agency to help that other government agency formulate policy and make decisions.

MR. TIGUE: I wouldn't agree with the latter, your Honor, but we'll get to that in a second.

THE COURT: Maybe we should get to it now.

MR. TIGUE: Okay. I think the law is pretty clear, and the Second Circuit seems to go along with the Ninth Circuit, in saying to be predecisional, it has to relate to a specific decision. And I think a very good example, for instance, is in the *Formaldehyde* case, where the document in question goes to the government official to make a decision: Should we publish this report in this journal that was considering publishing it?

Here this is not the intent of this. This is not to help some poor overworked government official to decide whether or not he should make a specific decision –

THE COURT: Perhaps he is not overworked, but he is beleaguered.

MR. TIGUE: I'm sure he's beleaguered, your Honor. It is to evaluate the entire criminal investigation provision of the Internal Revenue Service to give whatever conclusions or recommendations or evaluations you want to and to make all that public. It is not to help a specific decision, which I think clearly the law requires. And the Second Circuit quotes the Ninth Circuit case, talking about the need for a specific decision.

That's why what the government is urging your Honor to do here is they're urging you to stray too far from the very plain language of the statute itself. If the government wants to protect a certain group of documents because it's predecisional, some government official has to make a specific decision. Specific. That's not my word. It's the Second Circuit's word. It's the Ninth Circuit's word. There is nothing specific here. This is an overall, independent, totally independent top-to-bottom review of the whole Internal Revenue Service. This is not the kind of document that was intended for –

THE COURT: Why not?

MR. TIGUE: Even if it were generated within an agency, your Honor.

THE COURT: Why not? It's predecisional. Because based on that document, the commissioner is going to decide. Do I retain this policy of using administrative subpoenas rather than grand juries? Do I switch to grand juries? How do I switch? To what extend do I switch? How do I deal with investigations? And so on.

The response was to strong criticisms made by members of the public and by many members of Congress to what was considered overrreaching by the Internal Revenue Service. So the commissioner, and it was part of his appointing process, had to tell Congress, We'll look into it. If we need to make changes, we'll make changes. It seems to me that's the very hallmark of what an agency does when it needs to review its policies and consider whether it needs to make changes or not.

* * *

THE COURT: Now, the whole area goes back to *United States v. Reynolds* in I think 1942, where advice to an agency head claimed as privileged by the agency would qualify as privileged material. And the law developed in many jumps and starts after that.

Here is a device [sic] to the commissioner, the highest official in the Internal Revenue Service, influencing how the commissioner is going to reduce these recommendations into policy. If this isn't privileged, what would be, in terms of its relationship by an agency head?

MR. TIGUE: I don't know that I understand your question, your Honor.

THE COURT: It seems to me it's the hallmark of predecision. I can't think of anything that is closer to a predecisional type of material as Judge Webster's recommendation or the information developed by Judge Webster leading to his recommendation.

* * *

MR. ALTER: May it please the court, your Honor, I'm Assistant U.S. Attorney Daniel Alter, and I'm appearing today on behalf of the Department of Justice and the Internal Revenue Service.

Your Honor, plaintiffs' counsel just now emphasized that had Deputy U.S. Attorney Shirah Neiman provided her memorandum directly to the IRS, there would be no question that it would have been privileged. And as your Honor has pointed out, this whole case really boils down to the effect that her delivery of that memorandum to the special commission specifically organized to review the IRS's criminal investigative division and to provide recommendations for possible recommendations [sic] and improvements in their practicing procedure, that the delivery of that memorandum to that commission somehow affected the deliberative process provision that should shield --

THE COURT: And the publication by Judge Webster of his report.

MR. ALTER: Your Honor, if I might go to that point immediately and discuss the publication point.

THE COURT: Yes.

MR. ALTER: It really is quite irrelevant. I will point to two cases directly on point. The first case is the law of the Second Circuit, and it's the *Lead Industries* case. It is the case which 20 years ago established the principal controlling law in this circuit that a consultant's work qualifies as intra-agency memoranda for the purposes of Exemption 5.

THE COURT: I have no problem with that issue.

MR. ALTER: And in that case, your Honor, the consultants testified at an open agency hearing for the whole world to see with regard to their opinions and views concerning the -- in that case, there was an issue of what level of lead should be present in the environment. They were environmental consultants. They testified at an open public hearing with regard to their views. They also provided the agency with draft reports which were at issue in the case. That is what the plaintiffs were seeking to obtain in that case.

And the court made clear that they agency incorporated I believe it was 55 pages of the draft reports into the agency's final report on the issue. And notwithstanding the fact that the consultants testified at a public hearing with regard to their views and opinions and 55 pages of their draft material was incorporated into the final product by the agency, Judge Friendly nevertheless held that those draft reports were

deliberative materials and shielded by the deliberative process privilege.

THE COURT: And there was no waiver.

* * *

THE COURT: Before you leave *Lead Industries*, it is also interesting, and Mr. Tigue might take note of this, Judge Friendly ruled, this is at page 83, "Nothing turns on the point that the DBA and CPA reports were prepared by outside consultants who had testified on behalf of the agency rather than agency staff. On this we have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie v. David*, 448 F.2d 1067 at 1078, note 44, 145 U.S. App.D.C. 144 at 155 (D.C. Cir. 1971)."

In other words, creating the analogy to Judge Webster's report, the fact that an outside consultant involved in the preparation of the report and organizing the studies testifies to Congress and spreads the information on the public record does not compromise the deliberative process that went into the creation of that testimony.

It seems to me, Mr. Tigue -- and if you don't mind, Mr. Alter, let me get Mr. Tigue to address this particular point.

It seems to me, Mr. Tigue, that this is exactly what happened here. Judge Webster gathered a lot of information, and it was part of the deliberative process that Judge Webster

went through before he issued his public report upon which the agency was going to formulate policy.

MR. TIGUE: What the government is leading the court to is error here. What it continuously does in its papers is mixes up the Neiman memorandum with the Webster report to suit its basis.

THE COURT: The Neiman memorandum is part of the deliberative process that Judge Webster went through before he issued his public report upon which the agency was going to formulate policy.

MR. TIGUE: So the government says, Okay [sic], if it was sent to an agency, it would be okay. But now that it's sent to Judge Webster, even though Shirah Neiman is not a consultant to the Internal Revenue Service, not under any --

THE COURT: It doesn't make any difference.

MR. TIGUE: It makes all the difference in the world, your Honor.

THE COURT: It doesn't make any difference. She's an agency helping another agency through the medium of a consultant engaged by the agency being helped. That's exactly what happened here in *Lead Industries Association v. OSHA*.

* * *

Appendix C

THE COURT: What is in issue here is a memorandum dated February 23, 1999, written by Deputy United States Attorney Shirah Neiman, to a specially appointed commission by the Internal Revenue Service at the strong instance [sic] of Congress. That specially appointed commission – I'll call it the Webster commission because of its chairman, Judge Webster – was assigned the specific task to evaluate and report upon the procedures of the Internal Revenue Service, criminal investigation division.

Ms. Neiman's memorandum described evaluations of the United States Attorney's Office in the Southern District of New York and its criticisms of the criminal investigation department of the IRS and the policies and procedures pursued by that division. One sentence of Ms. Neiman's memorandum was quoted in Judge Webster's report of more than a hundred pages, and Judge Webster's report was published to the public.

The government is moving for summary judgment dismissing the complaint. Plaintiff cross moves for summary judgment in plaintiffs' favor seeking production of Ms. Neiman's memorandum.

For the reasons already expressed on the record in terms of the views that I have expressed to Mr. Tigue and to Mr. Alter, I grant the government's motion to dismiss the complaint provided, however, that I will engage in an in camera review of the Neiman memorandum with a view towards seeing if any part of it can be redacted and produced. And that will be the subject of a subsequent order.

Accordingly, I grant Mr. Tigue's motion to that extent and otherwise dismiss it. And just to modify what I said before, I grant the government's motion to dismiss with the exception of this in camera review.

Now, in order for a document to be exempt from production under Section 552(b)(5), it must be an inter-agency or an intra-agency communication, it must be predecisional, and it must reflect the deliberative process. That was the holding of *Grand Central Partnership Inc. v. Cuomo*, 166 F.3d 473 at page 482 (2d Cir. 1999). That case ruled that a document is predecisional when it is prepared in order to assist an agency decision-maker in arriving at its decision. And that's clearly the case, as I have indicated before.

The privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the Internal Revenue Service as a whole. And a document is deliberative if it is part of a process by which administrative policies are made and formulated. And as I've indicated before, those are all the hallmarks of what was essential in the memorandum delivered by Ms. Neiman.

In terms of the requirement of intra-agency, Mr. Tigue argues that since the Webster commission was not itself an agency, and since the Neiman memorandum was prepared for the Webster commission, it can't qualify for the inter-agency or intra-agency communication criteria.

I reject this argument. It is clear to me that consultants engaged by an agency are covered. As I have indicated before in the various citations I have read into the record, this is clearly part of the deliberative process that was being pursued by the Internal Revenue Service in formulating policy and evaluating whether or not any of its standards should be adhered to or modified or rejected. That is essentially what activities were being pursued and why, in my judgment, the Neiman memorandum qualifies for the intra-agency privilege.

It appears that the Neiman report is an expression of personal and candid opinions, evaluations, criticisms and reviews and perhaps suggestions of Ms. Neiman on the basis of her extensive government experience and of her colleagues in the United States Attorney's Office in the Southern District of New York.

Therefore, under the cases that have been cited to me and which I reviewed during the course of argument, the document is covered. It is clearly predecisional, and it is clearly part of the intra-agency privilege.

And under the doctrine that was analyzed and expressed by Judge Friendly, and there is no greater authority on the administrative agency process than Judge Friendly was, in *Lead Industries Association v. OSHA*, which I have cited and discussed before, it's 610 F.2d 70, (2d Cir. 1979), there was not a waiver.

Appendix C

So that is essentially my decision. I will issue a summary order on this decision myself and a subsequent order with regard to the outcome of the review for redaction.

Supreme Court, U.S.
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No. 02-1206

In the Supreme Court of the United States

JOHN J. TIGUE, JR. AND MORVILLO, ABRAMOWITZ, GRAND, IASON & SILBERBERG, P.C., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a memorandum prepared by an Assistant United States Attorney, to assist a commission established by the Internal Revenue Service (IRS) to investigate the policies and practices of the agency's Criminal Investigation Division and to recommend possible changes in the IRS, is an "inter-agency or intra-agency" memorandum within the meaning of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 312 F.3d 70. The orders of the district court (Pet. App. 23a-24a, 25a-26a) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 15, 2002. The petition for a writ of certiorari was filed on February 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon

request of records held by an agency of the federal government. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5 authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The privileges incorporated by Exemption 5 include the "deliberative process" privilege, which "covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Department of the Interior* v. *Klamath Water Users Protective Ass'n (Klamath Water Users)*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Id.* at 8-9 (citation and internal quotation marks omitted).

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States," 5 U.S.C. 551(1), "includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the

Executive Office of the President), or any independent regulatory agency," 5 U.S.C. 552(f)(1). The courts of appeals that have addressed the question have uniformly concluded that, at least under some circumstances, a document prepared outside the government may qualify as an "inter-agency or intra-agency memorandum[]" within the meaning of Exemption 5. See, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Soucie* v. *David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

In *Klamath Water Users*, this Court considered the application of Exemption 5 to communications between an Indian Tribe and the Department of the Interior. See 532 U.S. at 5-6. The Court assumed without deciding that, in appropriate circumstances, documents prepared by outside "consultants" "may qualify as intra-agency under Exemption 5." *Id.* at 12. The Court held, however, that the documents at issue in that case fell outside the scope of Exemption 5 because "the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." *Id.* at 14; see *id.* at 12 (de-

scribing the Tribes in that case as "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone").

2. In July 1998, Internal Revenue Service (IRS) Commissioner Charles Rossotti appointed William H. Webster to form a task force (the Webster Commission) to review the policies and procedures of the IRS's Criminal Investigation Division (CID). Pet. App. 4a; see C.A. App. 18, 85. The Commissioner directed that the task force "compile data and information from which [it] could evaluate" the CID, "determine its effectiveness in accomplishing its mission, and make recommendations for improvement" to the Commissioner. *Id.* at 85; see Pet. App. 4a. Mr. Webster, with the assistance of a former head of the Justice Department's Office of Professional Responsibility, recruited a trial attorney in the Department's Criminal Division "to supervise a staff with extensive criminal investigative, law enforcement, and federal prosecutive experience, including two experienced prosecutors from the Department of Justice and nine federal law enforcement Special Agents." C.A. App. 85.

During its nine-month review of the CID, the Webster Commission consulted a number of law enforcement officials, including lawyers in the United States Attorney's Office for the Southern District of New York. Pet. App. 4a. "The Webster Commission specifically requested the opinions of the Southern District because it handled more tax investigations than any other" United States Attorney's office. *Ibid.* Responding to a request by the Commission, then-Deputy United States Attorney Shirah Neiman prepared a 16-page memorandum (the Neiman Memorandum) expressing opinions and recommendations of the Southern District regarding possible modifications to the IRS's

criminal enforcement policies and procedures. *Ibid.*; C.A. App. 199.

Neiman prepared the memorandum with the expectation that it would remain confidential. C.A. App. 199; see Pet. App. 4a-5a. The Neiman Memorandum contains detailed evaluations of various aspects of federal criminal tax enforcement, including differences between the Southern District's positions on particular issues and those of other federal components. C.A. App. 199. Neiman's declaration in this case explained that "[t]he analyses contained in the memorandum are not of the sort usually shared with the public by a prosecutorial office," and Neiman stated that she "would have drafted [the memorandum] differently" if she had known that it "might become a public document." *Ibid.*

The Webster Commission ultimately released a 113-page report that outlined the Commission's findings and recommendations for improving the effectiveness of the CID. Pet. App. 5a. The final report was provided to the IRS and was made public. See *ibid.*; C.A. App. 18, 67-68. The Neiman Memorandum is cited once in a footnote and quoted once in the text of the Webster Commission's report. Pet. App. 5a-6a. The IRS Commissioner expressed thanks for the Webster Commission's recommendations and stated his agreement with many of those proposals, see C.A. App. 67-68, while noting that some of the recommendations "need further analysis and design work in coordination with our other organizational changes," *id.* at 68; Pet. App. 5a.

3. Petitioners are an attorney and a law firm that frequently represent clients in connection with federal tax investigations, enforcement actions, and prosecutions. Pet. App. 6a. "Believing that review of the Neiman Memorandum would improve [their] under-

standing of Southern District policy and thus allow [them] to represent [their] clients better," petitioners filed a FOIA request for the memorandum. *Ibid.* The Department of Justice refused to release the document, invoking the deliberative process privilege as incorporated by Exemption 5. *Ibid.*

Petitioners then filed suit under the FOIA against the Justice Department and the IRS. The district court granted the government's motion for summary judgment, holding that the Neiman Memorandum is protected by FOIA Exemption 5. See Pet. App. 23a-26a. The court further concluded, after reviewing the document in camera, that any factual material contained in the Neiman Memorandum is "inextricably intertwined with evaluations and recommendations of policy" and therefore is not subject to compelled disclosure. *Id.* at 24a.

4. The court of appeals affirmed. Pet. App. 1a-22a.

a. The court of appeals held that the Neiman Memorandum is an "inter-agency" document within the meaning of Exemption 5. Pet. App. 10a-16a. The court explained that "the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID." *Id.* at 12a. The court noted that petitioners "recognize, as they must, that the privilege would have been maintained had Neiman given her memorandum directly to the IRS." *Id.* at 14a. The court found that "[t]he fact that Neiman transmitted [the memorandum] to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter our view of the matter." *Ibid.* The court of appeals concluded that the Neiman Memorandum is an "inter-agency"

document within the meaning of Exemption 5 because it was "prepared by one governmental agency for use by another agency," and that "[t]he interposition of the Webster Commission between the two agencies does not alter this result." *Id.* at 16a.

b. The court of appeals further held that the Neiman memorandum is covered by the deliberative process privilege. Pet. App. 17a-18a. The court explained that the memorandum was "predecisional" because it "was prepared for the Commission in order to assist the IRS in its decisionmaking regarding the future of the CID." *Id.* at 17a; see *id.* at 18a ("[T]he fact that the government does not point to a specific decision made by the IRS in reliance on the Neiman Memorandum does not alter the fact that the Memorandum was prepared to assist IRS decisionmaking on a specific issue.").[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. While noting that the various FOIA exemptions must be "narrowly construed," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976), this Court "has

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[1] The court of appeals rejected petitioners' contention that the Webster Commission's references to the Neiman Memorandum in its public report effected a waiver of the deliberative process privilege. Pet. App. 19a-21a. Based on its in camera review of the Neiman Memorandum, the court also concluded that any factual information contained in the document was not "reasonably segregable" (5 U.S.C. 552(b)) from its deliberative material, and that the document was therefore properly withheld in its entirety. Pet. App. 21a-22a. Petitioners do not challenge those holdings in this Court.

recognized that the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," it provided "specific exemptions under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (*1966 House Report*); see *John Doe Agency*, 493 U.S. at 152.

Exemption 5 of the FOIA, and the deliberative process privilege in particular, help to preserve that important balance. Exemption 5 reflects Congress's recognition that "a full and frank exchange of opinions would be impossible" if all internal government communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to operate in a fishbowl." *1966 House Report* 10; see *Wolfe* v. *Department of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). Although Exemption 5 applies by its terms to "inter-agency or intra-agency memorandums or letters," the courts of appeals that have addressed the question have uniformly held that records submitted by outside consultants that play essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee may be protected from compelled disclosure by that Exemption. See p. 3, *supra*; *Klamath Water Users*, 532 U.S. at 9-11

(discussing prior court of appeals decisions). As the District of Columbia Circuit explained:

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Soucie, 448 F.2d at 1078 n.44; see *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980) ("[A]n agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.").

2. In *Klamath Water Users*, this Court assumed without deciding that documents prepared by outside "consultants" may qualify as "inter-agency or intra-agency" documents within the meaning of Exemption 5. 532 U.S. at 12.[2] The Court held, however, that the

[2] As the Court in *Klamath Water Users* recognized (532 U.S. at 9-10), three members of this Court had previously endorsed that reading of Exemption 5's threshold requirement. In a dissenting opinion in *Department of Justice* v. *Julian*, 486 U.S. 1 (1988), Justice Scalia, joined by Justices O'Connor and White, recognized that while "the most natural meaning" of the phrase "intra-agency memorandum" is a memorandum passing between employees at a single agency, the courts of appeals had held that the term could be

tribal communications at issue did not satisfy that threshold requirement because the outside party that prepared them had sought to vindicate its own interests "at the expense of others seeking benefits inadequate to satisfy everyone." *Ibid.*; see *id.* at 14 (emphasizing that the purpose of the Tribe's communications was "to support a claim by the Tribe that is necessarily adverse to the interests of competitors"). The Court explained that in the "typical cases" where courts have applied Exemption 5 to documents created by outside consultants, "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 11.

The considerations that led this Court in *Klamath Water Users* to find Exemption 5 inapplicable to the

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interpreted to include memoranda from outside consultants. *Id.* at 18 n.1 (Scalia, J., dissenting). Justice Scalia stated:

> [T]hese decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Ibid. The Court in *Julian* did not address the question whether the documents at issue there were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, because it concluded that the relevant documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

Tribe's communications are wholly absent here. The Webster Commission was established by the IRS Commissioner to investigate the policies and procedures of an important agency component and to make recommendations for improvement. The Commission's staff was supervised by a Justice Department attorney and included federal prosecutors and law enforcement agents. C.A. App. 85. Like the consultants in the "typical cases" that have held Exemption 5 applicable to consultant communications, see *Klamath Water Users*, 532 U.S. at 10-11, the Webster Commission "played essentially the same part in an agency's process of deliberation as * * * agency personnel might have done," *id.* at 10. The members of the Webster Commission had no private interest in the outcome of the proceedings, and the Commission's "only obligations [we]re to truth and its sense of what good judgment calls for." *Id.* at 11.

Indeed, the rationale for applying Exemption 5 to consultants' reports is even more compelling here than in the "typical" cases identified by this Court in *Klamath Water Users*. Whereas those cases have generally involved documents created by non-governmental entities, the specific memorandum requested by petitioners was written by a Deputy United States Attorney. As the court of appeals explained, it is undisputed "that the privilege would have been maintained had Neiman given her memorandum directly to the IRS." Pet. App. 14a. And as the court correctly held, "[t]he fact that Neiman transmitted it to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter" the governing legal analysis. *Ibid.*

3. Petitioners contend (Pet. 16) that review by this Court is warranted because there is no "unanimity of

opinion regarding how the consultant corollary should be applied." In support of that assertion, however, petitioners note only that the Ninth Circuit has not yet had occasion to decide whether documents submitted by outside consultants may be covered by Exemption 5. See *ibid.* Though petitioners contend that such records are categorically excluded from Exemption 5's coverage, they identify *no* judicial decision that has endorsed that view. Absent a conflict in authority, the question presented does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JOHN J. TIGUE, JR. and
MORVILLO, ABRAMOWITZ, GRAND,
IASON & SILBERBERG, P.C.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE
and INTERNAL REVENUE SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

In their brief in opposition to the petition for a writ of certiorari, respondents maintain that review is not warranted because the decision of the Court of Appeals in the instant case is correct and does not conflict with the decisions of this Court or of other courts of appeal. Respondents' Brief at 7. Each of respondents' arguments is without merit.

Respondents assert that the decision of the Court of Appeals for the Second Circuit in this case is correct while providing *no* support. Moreover, respondents fail even to address petitioners' argument that the Court of Appeals' application of Exemption 5 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), to communications between a government agency and outsiders not employed by a government agency is in conflict with the plain language of the FOIA and with numerous opinions of this Court requiring that FOIA exemptions be construed narrowly and that statutes be interpreted in accordance with the ordinary meaning of their terms. *Compare* Petition for a Writ of Certiorari at 8-14 with Respondents' Brief at 7-11.

Instead, respondents argue only that the courts of appeal that have addressed the question have "uniformly held" that records submitted by outside consultants that play essentially the same role in the agency's decisionmaking process as documents submitted by agency employees may be protected from disclosure under Exemption 5. Respondents' Brief, at 8.[1] Respondents' argument is substantively incorrect.

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1. It is noteworthy that this purported holding would not apply to the facts of this case. The document sought by petitioners was submitted to the independent Webster Commission from an agency, the Department of Justice, having no relationship (formal or otherwise) with the Commission.

As an initial matter, each of the cases cited by respondents comes from one of three federal circuits: the D.C. Circuit, the Fifth Circuit, or the Second Circuit. As discussed in the petition, the legal fiction known as the consultant corollary was created upon completely unsupported policy grounds in a three-sentence footnote appearing in a 1971 D.C. Circuit opinion. Pet. at 10 (discussing *Soucie*, 448 F.2d at 1078 n.44). During the 1970s, without providing any additional analysis, the Fifth and Second Circuit Courts of Appeal adopted the consultant corollary as it was formulated in *Soucie*. *See Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (quoting *Soucie*); *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) ("we have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie*"). Despite the lack of analysis in each case, and despite numerous subsequent decisions of this Court emphasizing that FOIA exemptions are to be construed narrowly, the consultant corollary has remained the law in these three circuits, resulting in denials of numerous meritorious FOIA requests.

By providing a substantively incorrect summary of the consultant corollary, respondents' brief itself demonstrates some of the confusion regarding the doctrine. Respondents assert on page 8 of their brief that documents received from outsiders that play the same role in an agency's decisionmaking process as documents submitted by agency employees are protected by Exemption 5. This view was rejected first by the Ninth Circuit in 1999 and then by this Court in 2001. *See Klamath Water Users Protective Assoc. v. Department of the Interior* (*Klamath I*), 189 F.3d 1034, 1038 (9th Cir. 1999) and *Department of the Interior v. Klamath Water Users Protective Assoc.* (*Klamath II*), 532 U.S. 1, 11-12 (2001).

When *Klamath I* was before the Ninth Circuit, based upon D.C. Circuit and Fifth Circuit precedent, the *dissenting* opinion reasoned that the primary consideration was the role the document sought played in the deliberative process, not the identity of the document's creator. *See Klamath I*, 189 F.3d at 1043-44 (Hawkins, J., dissenting). The majority disagreed, adopting a conflicting viewpoint. It held that even though the advice of certain Indian tribes was sought by the agency in question, because the tribes were not impartial actors, nothing they submitted could be protected from disclosure as a consultant's report even under the "expansive view" of Exemption 5's "inter-agency/intra-agency test." *Id.* at 1038. In a unanimous opinion, while expressly declining to rule on the validity of the consultant corollary, this Court affirmed the majority decision of the Ninth Circuit. *See Klamath II*, 532 U.S. at 10-12.

The confusion surrounding the consultant corollary is further evidenced by the instant case wherein the courts below were unable to agree as to how the corollary should be applied. The Court of Appeal for the Second Circuit held that the document sought by petitioners is protected from disclosure as an "inter-agency" memorandum after the District Court for the Southern District of New York held that the same document is an "intra-agency" memorandum. Pet. App. 16a, 38a.

Although this Court was not required in *Klamath II* to rule on the validity of the consultant corollary in order to hold that the documents sought in that case were not protected by Exemption 5, the Court discussed in detail the difference between "the most natural meaning" of the terms of the Exemption (advocated by petitioners) and "the more expansive reading" endorsed by respondents. *See Klamath*

II, 532 U.S. at 9-10, 12. Because the issue of whether communications with outsiders, including consultants' reports, are protected from public disclosure under FOIA Exemption 5 is the dispositive issue is this case, the issue is now ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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